

September 6, 2005

Stephen P. Pfahler, City Attorney
Bannan, Green, Frank & Terzian, LLP
[Address Redacted]
Los Angeles, CA 90071

Re: Your Request for Informal Assistance
Our File No. I-05-156

Dear Mr. Pfahler:

This letter is in response to your request on behalf of South Pasadena Councilmember David Margrave regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because the facts presented are of a general nature relating to the governmental decision and do not fully identify the factors involved in the governmental decision, we are treating your request as a request for informal assistance.² Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Does Councilmember Margrave have a conflict of interest that would require him to disqualify himself regarding any matters concerning the Arroyo Oaks project that may come before the South Pasadena City Council?

2. Can Mr. Margrave testify before the South Pasadena City Council as to the potential merits of the Arroyo Oaks project when that issue comes before the council for consideration?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

CONCLUSIONS

1. Yes. Councilmember Margrave has a conflict of interest and may not participate in any matters that may come before the South Pasadena City Council concerning Ms. Hamilton-Margrave's development projects, including the Arroyo Oaks project.

2. No. Councilmember Margrave may appear before the agency in the course of its prescribed governmental function as a member of the general public only if his appearance is to represent himself on matters related solely to the official's personal interests. Since the matter concerns the interest of Councilmember Margrave's former spouse, the matter does not relate solely to Councilmember Margrave's personal interests, as discussed below.

FACTS

David Margrave is a council member for the City of South Pasadena. Councilmember Margrave's former spouse, Diane Hamilton-Margrave, owns a dozen parcels of property in South Pasadena, including the residence at which Councilmember Margrave lives. Councilmember Margrave and Ms. Hamilton-Margrave have been legally divorced since 1986; however, Councilmember Margrave and Ms. Hamilton-Margrave still live in the same residence. Councilmember Margrave pays \$800 in rent monthly to Ms. Hamilton-Margrave. Councilmember Margrave has no ownership interest in any real property. Two of Ms. Hamilton-Margrave's other South Pasadena properties include 266 Monterey Road and 258 Monterey Road.³

Ms. Hamilton-Margrave owns a real estate management company, and a plumbing business – Morrow & Holman Plumbing ("M & H"). Councilmember Margrave has no affiliation with the real estate company. Councilmember Margrave advises that he is not an employee of the plumbing business, but that he "receives recompense from M & H for use of his State Contractor license and, under criteria governing such a relationship between a license holder and a business, serves as a Managing Responsible Officer thereof."

Ms. Hamilton-Margrave would like to develop several parcels of her property into condominium complexes including some commercial space. She has filed an application to develop the parcel that currently houses and the adjacent parcel – 258-266 Monterey Road, for a mixed use senior housing project with commercial space, to be known as Arroyo Oaks. Ms. Hamilton-Margrave may also apply for approval to develop a mixed use senior housing project with commercial space on nearby parcels she owns. Councilmember Margrave has been helping her complete paperwork for these efforts, but he has not been compensated for his work in this regard and will not accept compensation

³ For purposes of addressing the issues raised by this request only, we are accepting your representation that Councilmember Margrave and Diane Hamilton-Margrave are no longer married and that Councilmember Margrave has no interest in any properties owned by Ms. Hamilton-Margrave.

for such work. The Arroyo Oaks project will require city council approval of certain aspects thereof, which will most likely be considered at its meeting on September 7, 2005.⁴

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

STEPS 1 & 2: IS COUNCILMEMBER MARGRAVE A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As a member of the city council, Councilmember Margrave is a public official under the Act. (Section 82048.) Consequently, he may not make, participate in making, or otherwise use his official position to influence any decisions which will have a reasonably foreseeable material financial effect on any of his economic interests. As a member of the city council Councilmember Margrave will be called upon to consider actions that may have an impact on the construction application and approval of Ms. Hamilton-Margrave's development project. Therefore, he will be making, participating in making, or otherwise using his official positions to influence a governmental decision.

Regulation 18702.4 provides certain exceptions to "making or participating in making" a governmental decision that include "[a]ppearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the *official's personal interests* as defined in Title 2, California Code of Regulations, section 18702.4(b)." (Regulation 18704.2 (a)(2).) Pursuant to regulation 18702.4 (b) an official's personal interests include:

⁴ Two previous requests for advice submitted on behalf of Councilmember Margrave were withdrawn because the questions involved the same or similar issues to those that were the subject of a pending investigation by the Enforcement Division. (W-04-250 and W-05-143.) Because your current request is narrow in scope and, you have represented that there has been no past conduct associated with this matter, including no attempts to influence the decision associated with Councilmember Margrave's help in "completing the paperwork for these efforts," we are providing advice regarding the narrower issue presented in this request only.

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.”

Because any testimony Councilmember Margrave may give before the city council relating to the merits of the Arroyo Oaks project would relate to Ms. Hamilton-Margrave’s interests, and not solely to the personal interests of Councilmember Margrave, and because you state Ms. Hamilton-Margrave is no longer his spouse, this exception does not apply.

Accordingly, Councilmember Margrave may not testify before the city council as to the potential merits of the Arroyo Oaks project when that issue comes before the council for consideration.

STEP 3: DOES COUNCILMEMBER MARGRAVE HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (§ 87103(a); reg. 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5).

Councilmember Margrave's Economic Interests

Councilmember Margrave has potential economic interests as a result of the following:

(1) Since you state that Ms. Hamilton-Margrave is no longer Councilmember Margrave's spouse, he does not have a community property interest in her income, real property, or business. However, if Councilmember Margrave, has received \$500 or more within the 12 months prior to the time the governmental decision is made, from her business, M&H is a source of income to him. (Section 87103(c), regulation 18703.3(a)(1).)

(2) We have also advised that where a person "controls the employment relationship" between the public official and the business entity, both the person and the corporation are considered sources of income to the public official. (*Kuperberg* Advice Letter, No. A-99-223; *Lucas* Advice Letter, No. A-99-059.) Therefore, since Ms. Hamilton-Margrave controls the licensed contractor relationship as the owner of the business, Councilmember Margrave has an economic interest in both M&H Plumbing and Ms. Hamilton-Margrave, as sources of income, assuming he has earned \$500 or more during the 12 months preceding the governmental decision. For purposes of our further analysis, we will assume the amount of "recompense" he has received is \$500 or more over the preceding 12 months.

(3) Additionally, because he is the "Responsible Managing Officer" listed under his State Contractor license, he has an economic interest in the business entity under section 87103(d) and regulation 18703.1(b), as an officer of the business entity.

(4) We further note that, while not included in your facts, information provided on the California Contractors State License Board's website. www.cslb.ca.gov, indicates that the "Responsible Managing Officer ("RMO") David Lemner Margrave certified that he owns 10 percent or more of the voting stock/equity of the corporation." In a recent communication, you indicated that that information was correct when originally filed, but that Councilmember Margrave's stock in the business was subsequently transferred to Ms. Hamilton-Margrave under their dissolution agreement. Because the Commission does not act as a finder of fact, we have accepted the additional information you have provided, and we will not further address this factor in our analysis other than to point out that if Councilmember Margrave did own 10 percent of the stock he would have an economic interest in the business pursuant to section 87103(a) and regulation 18703.1(a), if his direct or indirect investment in the business entity is worth two thousand dollars or more.

(5) Likewise, under section 82030(a),⁵ if a public official owns a 10-percent interest or greater in a business, customers who are sources of income to that business are also considered sources of income to the public official.

⁵ "Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater."

(6) Finally, Councilmember Margrave appears to have an economic interest, under regulation 18703.1, subdivision (c), in the other business entity owned by Ms. Hamilton-Margrave, the real estate management company, as an “otherwise related business entity” as defined under regulation 18703.1, subdivision (d)(2)(B)(i) and (C).

STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

“In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704(a).)

For governmental decisions that affect business entities and sources of income, the standards set forth in regulation 18704.1(a) apply.

Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income ... is directly involved in a decision before an official’s agency when that person, either directly or by agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Under the facts you have presented, Councilmember Margrave’s sources of income, Ms. Hamilton Margrave and the business entity M & H are directly involved in the governmental decision. She has, or will, initiate the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request *and* is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. Because Councilmember Margrave economic interest, M & H, is located on the property that is the subject of the decision, the decision involves an entitlement to, and it is, therefore, directly involved. (Regulation 18704.1(a)(1) & (2).)

You have not provided us with any facts concerning the potential involvement of Councilmember Margrave’s other economic interest, the real estate management company. However, since Councilmember Margrave’s economic interests, Ms. Hamilton-Margrave is directly involved in the governmental decision, for purposes

of the question upon which you seek this advice, we need not determine whether or not any other economic interests are directly or indirectly involved. If you wish further information on this aspect of the conflict of interest analysis, you may seek additional advice.

STEPS 5: MATERIALITY STANDARD

Directly Involved Economic Interests

If a source of income is directly involved in a governmental decision, the materiality standards set forth in regulation 18705.3(a) apply. Regulation 18705.3(a) provides that for a directly involved source of income economic interest, “[a]ny reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material. Accordingly, if the financial effect on Ms. Hamilton-Margrave or M & H resulting from the governmental decision involving the development of the Royal Oaks project is reasonable foreseeable, Councilmember Margrave would have a conflict of interest preventing him from participating in the decisions.

If a business entity, other than a source of income, in which a public official has as economic interest is directly involved in a governmental decision, the materiality standards set forth under regulation 18705.1(b) apply. (Regulation 18705.1(a)(1).) Because, as an officer of the business, Councilmember Margrave has more than “only” an investment interest in the business entity, the financial effect is presumed to be material.

STEP 6: REASONABLY FORESEEABLE

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706 (a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Under the facts presented, there is a substantially likelihood that the materiality standards applicable to Councilmember Margrave’s economic interests will be met as a result of the governmental decision. (Regulation 18706 (a).)

STEPS 7 & 8: PUBLIC GENERALLY AND LEGALLY REQUIRED PARTICIPATION

You have not presented any facts to suggest that analysis of the final two steps of the conflict of interest analysis, “public generally” and “legally required participation,” are necessary.

For your information, we have enclosed the pamphlet "Can I Vote," a guide to preventing conflicts of interest for public officials. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

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Sincerely,

Luisa Menchaca
General Counsel

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Counsel, Legal Division

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